for this requirement nor does it attempt to explain why standalone voice is a necessary service for a CAF II recipient to provide. After all, the Commission's CAF cost model has determined which census blocks are high-cost based on certain assumptions about what services households in these areas will purchase. The cost model assumes that consumers will purchase both voice *and* broadband service, which the Commission also assumed when it established its high-cost benchmark. This 2011 Commission decision to require standalone voice, which was clearly an afterthought, is not only inconsistent with its cost model-based decisions, it imposes higher, unfunded costs on CAF II recipients that are price cap carriers.

These increased costs are entirely unnecessary as industrywide data demonstrate that the vast majority of consumers do not desire or purchase standalone voice even when it is available. Only 5 percent of U.S. households subscribe to POTS alone and this figure is decreasing with each passing year.[83] Based on the data, the Commission can no longer reasonably argue that standalone voice is a service to which a substantial majority of residential customers subscribe, and thus meets the universal service definition in section 254.[84] Clearly, it is the quite the opposite. This is an instance of the Commission overregulating to deal with the rare exception, not the rule. AT&T urges the Commission to reconsider its 2011 standalone voice decision and to permit CAF II recipients to offer voice service only as a bundled offering (e.g., voice and broadband).

AT&T, USTelecom, and others have repeatedly urged the Commission to separate Lifeline participation from the ETC designation. As we explained in the Background Section of these comments, Congress expressly exempted the Commission's Lifeline program from the

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[83] Kovacs Study at 11.

[84] 47 U.S.C. § 254(c)(1)(B).

requirements contained in the 1996 Act's new universal service statute, section 254.[85] This congressional carve-out includes the requirement in section 254(e) that carriers must be ETCs designated under section 214(e) in order to obtain federal universal service support.[86] The Commission tied the ETC designation to Lifeline participation through its rules.[87] It could just as easily break that link by amending its rules to permit, not require, high-cost ETCs to participate in the Lifeline program. By using the authority that Congress gave it in section 254(j) to allow non-ETCs to participate in Lifeline, the Commission could encourage an even greater variety of service providers to participate in this program. Moreover, expanding the program to permit non-ETCs to participate is essential if the Commission desires to make available Lifeline discounts for broadband service.[88]

Included among the principles on which Congress required the Commission to base its universal service policies is the principle that low-income consumers should have access to telecommunications and information services.[89] The Commission may be concerned that if it sunsets a price cap carrier's ETC designation in an area where it receives no high-cost support, Lifeline-eligible consumers would have no ability to obtain Lifeline-discounted service.

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[85] *See id.* § 254(j).

[86] *See id.* § 254(e).

[87] *See* 47 C.F.R. § 54.405.

[88] This is true because the Commission will not provide CAF II support in areas where an "unsubsidized competitor" is providing broadband service at a certain speed. *See, e.g., USF/ICC Transformation Order* at ¶ 170. Of course, most unsubsidized competitors are cable operators who are unlikely to be ETCs. Under the Commission's current rules, which require Lifeline providers to be ETCs, a Lifeline-eligible person residing in an area served by a non-ETC cable operator could never obtain discounted Lifeline broadband service from that cable provider, even if no other entity is providing broadband service in that geographic area. If the Commission adopts AT&T's Lifeline Provider proposal, however, that eligible consumer could obtain Lifeline-discounted broadband service from the non-ETC cable company if it elects to participate.

[89] 47 U.S.C. § 254(b)(3).

However, based on AT&T's data, that scenario is almost nonexistent. First, in every single AT&T price cap carrier wire center, there are at least 3 Lifeline providers and the average number of Lifeline providers across all AT&T wire centers is over 12. AT&T selected two representative price cap carrier affiliates, Illinois Bell Telephone Company (d/b/a AT&T Illinois) and BellSouth Telecommunications, LLC (d/b/a AT&T Louisiana), to collect and analyze detailed subscriber and competitive data. Among other things, the data show that most Lifeline customers choose to obtain their Lifeline benefit from a wireless provider. In Illinois, 95.6 percent of the Universal Service Administrative Company's (USAC's) 2013 disbursements to Lifeline providers were to wireless carriers. In Louisiana, that figure is 95.9 percent.

When the Commission asserts that price cap carriers "recover the costs associated with many of those [non-high-cost-funded ETC] obligations from other sources" it cites its Lifeline program as the prime example.[90] The Commission fails to acknowledge the significant administrative costs associated with Lifeline participation. By the Commission's own estimate, participating in its Lifeline program costs providers approximately $600 million a year, or about 37 percent of the $1.64 billion/year program.[91] Additionally, Lifeline is a pass-through program, which means that carriers are reimbursed $9.25/month per customer for each $9.25 discount they

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[90] *See Seventh Order on Reconsideration* at ¶ 122 & n.268 ("For example, the Commission reimburses incumbent LECs for their provision of Lifeline service . . . that is distinct from the high-cost universal service program. . . .").

[91] FCC Supporting Statement, 3060-0819 (Sept. 2012), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201207-3060-011. The $600 million figure does not include costs that are not borne by all ETCs (e.g., the estimated $20 million/year that prepaid wireless Lifeline providers incur to comply with the Commission's non-usage rule). *See also* Universal Service Administrative Company, Federal Universal Service Support Mechanism Fund Size Projections for Fourth Quarter 2014, at 19 (August 1, 2014) *available at* http://www.usac.org/about/tools/fcc/filings/2014/Q4/USAC%204Q2014%20Federal%20Universal%20Service%20Mechanism%20Quarterly%20Demand%20Filing%20-%20Final.pdf (estimating the total annual 2014 Lifeline support to be $1.64 billion).

provide to their Lifeline customers. The Commission should not compel providers to incur such substantial non-reimbursable costs by requiring them to participate in the Lifeline program. This is particularly true given that Lifeline consumers do not desire price cap carrier-provided Lifeline benefits. Compelling a certain class of carrier to offer a service that is costly to provide and that consumers do not want is the wrong policy.

III. THE COMMISSION'S MOBILE WIRELESS PROPOSALS ARE ARBITRARY AND OTHERWISE UNLAWFUL.

The Commission seeks comment on two key mobile wireless proposals. First, the Commission proposes to exclude from the areas eligible for Mobility Fund Phase II (MFII) support only those areas covered by 4G LTE provided by either AT&T or Verizon, rather than any area covered by 4G LTE services offered by any mobile wireless provider. Second, the Commission proposes to accelerate the phase-out of wireless frozen support for those providers whose frozen high-cost receipts are one percent or less of their wireless revenues. Both proposals are substantially flawed and require significant revisions before the Commission could adopt them.

A. The Commission Should Target Mobility Fund Phase II Support To Areas That Lack 4G LTE Offered By *Any* Mobile Wireless Provider.

AT&T supports the Commission's proposal to target MFII support to those areas currently unserved by 4G LTE.[92] We agree with the Commission that its universal service programs, including MFII, should "preserv[e] and extend[] service in those areas that will not be served by the market without governmental support."[93] However, the Commission offers no

[92] *FNPRM* at ¶¶ 239-41.

[93] *Id.* at ¶ 239.

explanation for why it is proposing to ignore that sensible and principled limitation when it identifies areas eligible for MFII support. Specifically, the Commission proposes to exclude from MFII eligibility only those areas that have 4G LTE provided by *AT&T or Verizon.* Inexplicably, areas that have 4G LTE provided by Sprint, T-Mobile or any other mobile wireless provider *would* be eligible for MFII support. In other words, it appears the Commission is essentially proposing to provide MFII funding to Sprint, T-Mobile and any other mobile wireless carrier that is already providing 4G LTE service in a particular area as long as that carrier is not called "AT&T" or "Verizon." Under this construct, mobile wireless carriers not named "AT&T" or "Verizon" may be able to receive MFII funding for doing nothing more than they do today, which is provide 4G LTE service.

Not only is this proposal discriminatory, in contravention of the Commission's competitive neutrality principle, it also is arbitrary and capricious, and wasteful. Instead of awarding universal service funding to providers that are already offering 4G LTE service, the Commission should exclude from MFII eligibility *any* area covered by 4G LTE, regardless of the identity of the service provider. This modification to the Commission's proposal would more effectively implement the Commission's "commitment" "to target the Mobility Fund Phase II funding in a way that preserves mobile service where it only exists today due to support from the universal service fund and to extend service to areas unserved by 4G LTE."[94] For the former (the corner cases where an area is receiving 4G LTE service by only one provider and that sole carrier receives federal high-cost support to provide mobile wireless service in that discrete area), the Commission could permit that provider to demonstrate through a waiver petition that

[94] *FNPRM* at ¶ 240.

continued funding is necessary in order for it to maintain 4G LTE service in that area.[95] If the Commission grants the waiver petition, then the Commission could deem that area eligible for the MFII competitive bidding process.

B. The Commission's Proposal To Eliminate Mobile Wireless Frozen Support On A Flash-Cut Basis For Recipients That Receive Little Funding Compared To Their Revenues Is Arbitrary And Capricious, And Unprincipled.

The Commission proposes an accelerated phase-down in legacy high-cost support for certain wireless providers using a misguided and arbitrary standard. As proposed, if a mobile wireless provider's frozen support receipts are "one percent or less of its wireless revenues," then the Commission proposes eliminating that carrier's support with a flash cut by the end of 2014 or on the effective date of the rule, whichever is later.[96] This proposal would undo the careful balance that the Commission struck in its *USF/ICC Transformation Order*.

In that order, the Commission decided to terminate its so-called "identical support" rule, through which the Commission awarded high-cost support to mobile wireless carriers (called, competitive ETCs or CETCs) based on the per-line support amount that the Commission provided to the underlying ILEC in that area. This rule undoubtedly spurred mobile wireless deployment in rural, high-cost areas but it did so in an inefficient manner as it allowed multiple CETCs to receive support for providing service in the same area, even when that area may have been served by mobile wireless providers that did not receive support. AT&T advocated that the Commission phase out legacy high-cost support (including CETC support) over a five-year period (reducing CETC support in 20 percent/year increments) and transition that support to an

[95] *See id.* at n.467 (citing *USF/ICC Transformation Order* at ¶ 542 and finding that a "mobile provider should include in its waiver petition 'evidence demonstrating that it is the only provider of mobile service in a significant portion of any study area for which it seeks a waiver.'").

[96] *FNPRM* at ¶ 253.

Advanced Mobility Fund.[97] The Commission agreed and adopted a five-year phase-down in CETC support, finding that this "transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers" and a five-year phase-out allows CETCs "to adjust and make necessary operational changes to ensure that service is maintained during the transition."[98]

Ignoring these prior findings about the importance of avoiding flash cuts in support, which it repeats several times in its 2014 *CAF II Report and Order*[99] (to which the *FNPRM* is appended), the Commission proposes to do just that for certain mobile wireless providers. Eliminating wireless frozen support on a flash-cut basis by the end of 2014 or on the effective date of the rule (whichever is later) is inappropriate for any provider, regardless of how much or how little frozen support it receives.

Given that the comment cycle for this *FNPRM* will not close until September, it is unlikely that the Commission will release an order and final rules addressing this and other issues until some time in the fourth quarter – at the earliest. Thus, by the time any such rule becomes effective, affected carriers only may have a week or two before their support is eliminated on a flash-cut basis. It is true that the courts have given the Commission deference when it has balanced the various principles in section 254(b).[100] That balancing act, however,

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[97] AT&T Comments at 90, 109-110, WC Docket No. 10-90 (filed April 18, 2011).

[98] *USF/ICC Transformation Order* at ¶ 513.

[99] *See CAF II Report and Order* at ¶ 50 ("the Commission generally prefers to avoid flash cuts in support . . ."), ¶ 51 ("The Commission's desire to avoid flash cuts has led it to adopt transitions of varying lengths for various reforms adopted in the *USF/ICC Transformation Order*. . . ."), & n.90 (citing the *USF/ICC Transformation Order* at ¶¶ 242, 802, which discusses "the Commission's desire to avoid flash-cuts").

[100] *See, e.g., Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) ("The Commission enjoys broad discretion when conducting exactly this type of balancing.").

cannot exclude altogether a particular statutory principle.[101] Under section 254(b)(5), the Commission's universal service support mechanisms must be "predictable." To give any meaning that that statutory requirement, the Commission cannot adopt a rule that eliminates on a flash-cut basis a carrier's high-cost support on the same day or within a week or so that the rule becomes effective.[102]

In addition, eliminating affected carriers' support with a flash cut will leave these carriers with unfunded ETC service obligations, which is precisely what the Commission sought to avoid when it issued its *Mobility Fund Phase I ETC Forbearance Order*. As we discussed above, that decision enabled parties to avoid "tak[ing] on *unsupported ETC obligations* in portions of rural carriers' study areas – areas that may not be eligible for support or for which they may not win support."[103] To prevent that result here, AT&T believes its mobile wireless ETC affiliates would require approximately six months' notice in order to relinquish their ETC designations. Of course, this assumes prompt state commission (and Commission) consideration of these affiliates' ETC relinquishment notifications, which is a factor outside the control of any ETC.

The Commission's proposed one percent threshold is the textbook definition of arbitrary and capricious. The Commission asserts that carriers affected by its proposal are not relying on

[101] *See, e.g., Qwest Corp.*, 258 F.3d at 1200 ("the FCC may exercise its discretion to balance the principles against one another when they conflict, *but [it] may not depart from them altogether to achieve some goal*") (emphasis added).

[102] In some cases, carriers like AT&T Mobility make business decisions premised on the availability of high-cost support consistent with the Commission's rules (i.e., a predictable, five-year phase-down in support). Moreover, many of AT&T Mobility's ETC affiliates file progress reports with their state commissions and the Commission. These reports describe and depict how these affiliates spent their prior year's high-cost support to improve coverage and capacity and how they plan to spend the upcoming year's support to increase coverage and capacity in their ETC areas. Depending on permitting and construction status, the abrupt elimination of a carrier's support could result in stranded investment or require re-planning in ETC areas.

[103] *Mobility Fund Phase I ETC Forbearance Order* at ¶ 15 (emphasis added).

this support to maintain existing service[104] yet it makes no effort to explain why one percent, as opposed to five percent, or some other percentage is reasonable or anything other than arbitrary, which it plainly is. Nor does the Commission attempt to justify its suggestion to include *all revenues* for purposes of calculating the one percent (i.e., wireless and non-wireless revenues, telecommunications and information service revenues alike) and to perform this total revenue review at a holding company level.[105] It is not even clear that the Commission has tested its proposed metric to determine which companies will be captured by this arbitrary threshold and whether its assumption that these carriers are "not relying on such support" has any basis in fact. Companies of vastly different sizes and investment profiles could be caught in this net with totally unpredictable results for each one of them.

While AT&T does not believe the Commission could or should salvage this misguided proposal, we note that it would be far more appropriate to consider the wireless voice revenues of an ETC (and that ETC alone) in order to evaluate whether the amount of frozen wireless support the ETC receives is "a tiny fraction of its revenues."[106] These modifications would be an improvement but even with these changes, AT&T and, perhaps, others would oppose any Commission effort to implement this flawed and unlawful proposal.

The Commission's justification for maintaining wireless frozen funding for other carriers unaffected by this one percent cut-off is its "concern[] that some areas of the country may lose service if competitive ETC funding is further phased down before the rules for Mobility Fund

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[104] *FNPRM* at ¶ 253.

[105] *Id.*

[106] *Id.*

Phase II are adopted."[107] If this truly is the Commission's concern, then the logical and more effective way to address it is to determine whether there is at least one other unsubsidized facilities-based provider offering mobile wireless service in the same geographic area as a wireless frozen support recipient. If there is, then by the Commission's own measure, the sole justification for continued legacy wireless support does not exist in that area. Thus, if the Commission is determined to accelerate the phase down in CETC support, AT&T recommends the following framework: In the event that there is only one provider offering mobile wireless service in a particular area and that provider receives frozen high-cost support, the Commission should apply its existing rules (i.e., suspend the phase down until it implements MFII and then resume the phase down as scheduled).[108] For those areas where there is at least one facilities-based unsubsidized provider offering mobile wireless service in the same geographic area as a wireless frozen recipient, the Commission could reinstate the phase-down in support for that carrier (i.e., not wait to implement MFII before resuming the 20 percent/year phase down).

AT&T proposes a reasonable, principled, and statutorily compliant basis for the Commission to accelerate the phase out of frozen support in areas where an unsubsidized provider is offering mobile wireless service. Additionally, AT&T's proposal is consistent with the Commission's rules identifying CAF II-eligible areas, as well as its MFII proposal (albeit with the modifications AT&T proposes above). Finally, as we recommended above for price cap carrier ETC designations, AT&T urges the Commission to sunset mobile wireless carriers' ETC designations at the time it eliminates their support, unless the carrier notifies it otherwise. Not

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[107] *Id.* at ¶ 252.

[108] 47 C.F.R. § 54.307(e)(5).

only is this proposal the right policy, it is the most efficient means to address what otherwise would likely be a flood of relinquishment petitions.

IV. SEVERAL PROPOSED CAF II REQUIREMENTS WARRANT FURTHER MODIFICATION.

A. The Commission Should Clarify Several Fundamental Issues That Remain Unclear Prior To Offering The State-Level Commitment.

The Commission proposes several service obligations that, if adopted, would apply to some or all CAF II recipients. Before we discuss these Commission proposals, we recommend that the Commission clarify or confirm several other obligations or presumed obligations before the Commission implements CAF II. Prospective CAF II recipients need a full understanding of the requirements associated with accepting funding before they can determine whether the support will, as intended, improve the business case for deploying broadband to the identified high-cost areas. Every obligation must be clearly defined so that all parties – regulators, recipients, and USAC auditors – have a common understanding of how deployment goals are to be met and compliance will be confirmed. The stakes are high for everyone involved, and particularly for consumers in rural areas who lack broadband today.

First, the Commission should confirm that the ETC service area for any CAF II recipient should correspond to the set of high-cost locations for which that entity will receive funding. Second, all CAF II recipients should be subject to the same service obligations[109] and those obligations must be known to prospective CAF II participants before either they are offered support (price cap carriers via the state-level commitment) or they bid for support (competitive bidding participants). The Commission should not adopt CAF II service obligations that evolve

[109] AT&T thus agrees with the Commission's proposal to require all CAF II recipients to adhere to the same usage and latency standards. *FNPRM* at ¶ 149.

during the service term but that remain undefined at the time of providers elect to participate.[110] For example, if the Commission desires to increase the downstream speed of CAF II-supported broadband service during the CAF II service term, all prospective providers must know what that increase will be and when it will go into effect before they must decide whether to participate in CAF II.[111] It is for this reason that AT&T suggests the Commission revisit its determination that, for price cap carriers that accept the state-level commitment, the usage allowance could change over the service term to some as-yet undefined amount.[112] This decision runs counter to the Commission's conclusion that "[t]o plan a network, recipients of support need to know ahead of time what will be expected of them."[113] Instead, the Commission should establish what that minimum usage allowance will be during the entire CAF II service term in its final CAF II rules.

[110] This is equally true of state requirements. Since this is federal support for broadband, an interstate information service, it is AT&T's view that the states lack the authority to establish requirements on this funding and the Commission should prohibit states from imposing CAF II obligations on CAF II recipients. Moreover, to the extent that any state-specific CAF II obligation imposes a cost on a CAF II recipient and the state fails to provide funding to offset in full that cost, the state regulation is burdening the federal mechanism and should be preempted under section 254(f) as being inconsistent with the Commission's support mechanism. If the Commission is unwilling to preempt states from imposing conditions on this federal support, at a minimum, it should require states to inform prospective CAF II participants what those state-specific requirements are before these providers have to decide whether to accept funding (state-level commitment) or participate in the CAF II competitive bidding process. Once a provider accepts CAF II support, the Commission should prohibit states from imposing any new obligation on CAF II recipients.

[111] *See, e.g., FNPRM* at ¶ 157 (providing an example of a change during the service term that would be known to prospective CAF II participants in advance of the state-level commitment election or the competitive bidding process). As we discuss below, changing the speed of the required service from 4 Mbps downstream to 10 Mbps downstream, as an example, has significant consequences in terms of how CAF II providers must design and construct their networks. The Commission should expect that increasing the downstream speed further will have similar consequences. It is therefore essential for prospective CAF II recipients to be able to calculate the costs they might incur to comply with service obligations that change during the service term in order to decide whether they should participate.

[112] *See Connect America Fund*, WC Docket No. 10-90, 28 FCC Rcd 15060, ¶ 18 (WCB 2013) (*CAF II Service Obligations Order*). AT&T also recommends that the Commission reconsider its decision to reserve the right to adjust the CAF II latency standard based on the work of the Internet Engineering Task Force. *Id.* at n.57.

[113] *FNPRM* at ¶ 157.

If the Commission believes that its 100 GB minimum usage allowance may need to increase during the CAF II service term, it should adopt a rule that increases the usage allowance to a defined amount at a defined year (e.g., year 5 of an 8-year term or year 7 of a 10-year term). While such a decision may render ineligible some providers or technologies at the outset, it is better for these providers to know about any service obligation change now then halfway through the service term. If the Commission is reluctant to eliminate certain types of providers based on a future requirement, then it should simply adhere to the 100 GB minimum usage allowance and have the confidence that if the market demands much higher allowances, service providers will respond and increase their allowances whether they are required to do so.

Similarly, prospective CAF II recipients must know prior to accepting funding what the Commission and USAC will require of them to demonstrate that they meet the CAF II service requirements. In other words, in the event of a USAC audit, the Commission's rules should explain in advance of its offer of the state-level commitment how a CAF II recipient would need to demonstrate that it satisfies all of the CAF II service obligations.

Finally, the Commission requests comment on "issues related to [its annual reporting and certification procedures] that are applicable to all Connect America Fund recipients that are required to offer broadband service as a condition of receiving high-cost support."[114] The Commission seeks comment on several specific items, including its proposed broadband reasonable comparability certification. In its *CAF II Service Obligations Order*, the Wireline Competition Bureau (Bureau) concluded that a price cap carrier could demonstrate its compliance with the broadband reasonable comparability requirement by certifying that it offers fixed services meeting the Commission's broadband requirements for the same or lower prices in

[114] *Id.* at ¶ 310.

rural areas as urban areas.[115] And, for this purpose, the price cap carrier need not offer a particular rate nationwide; the Bureau found that it is sufficient for the carrier to offer the same rate in an urban area in the state where it accepts CAF II funding.[116] The Commission proposes to codify this common sense presumption in a rule of general applicability.[117] We agree but we recommend the following edits to the Commission's proposed rule:

§ 54.313(a): Any recipient of high-cost support shall provide

(12) a letter certifying that the pricing of the company's broadband services is not more than the applicable benchmark as specified in a public notice issued by the Wireline Competition Bureau, or is no more than the non-promotional prices **that the company** charge**s**~~d~~ for comparable **broadband** ~~fixed wireline~~ services in urban areas **within the state**.

AT&T recommends that the Commission replace "fixed wireline" with "broadband" in recognition that CAF II providers may not be fixed wireline broadband providers. Similarly, the Commission should amend its proposed rule in section 54.309 to incorporate the reasonably comparability presumption described above.

B. The Commission Could Adopt Its Proposal To Require All CAF II Recipients To Offer Broadband At A Speed of 10 Mbps Downstream If The Commission Makes Other, Related Changes.

The Commission's proposal to require all CAF II recipients to offer broadband service at a downstream speed of 10 Mbps[118] might be reasonable as long as the Commission gives CAF II recipients the flexibility to provide this service to fewer than 100 percent of the eligible locations

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[115] *CAF II Service Obligations Order* at ¶ 8.

[116] *Id.*

[117] *FNPRM* at ¶ 313.

[118] *See id.* at ¶ 140.

in their funded areas and the Commission gives these recipients the opportunity to obtain support for an additional three years.

While AT&T believes that it would be able to offer broadband service at 10 Mbps down/1 Mbps upstream to most CAF II-eligible locations with CAF II funding using technology that either is available today or will be available within the next several years, there may be pockets of CAF II-eligible locations where providing broadband at a downstream speed of 10 Mbps may not be economically viable, even with CAF II support. For this reason, it is essential that the Commission pair any decision to increase the downstream speed to 10 Mbps from the current 4 Mbps with giving CAF II recipients the flexibility to provide service to some percentage that is less than 100 percent of the CAF II eligible locations in its CAF II ETC service area. Additionally, the technologies and network design needed to deliver 10 Mbps downstream/1 Mbps upstream are substantially different from those that would have enabled the prior 4 Mbps downstream/1 Mbps upstream standard. Meeting a 10 Mbps downstream requirement is therefore likely to cause price cap carriers to redesign their networks in a significant way, which not only adds to these carriers' costs, it also adds time. AT&T also does not believe it could meet the current CAF II state-level commitment build-out milestones[119] if it has to offer broadband service at 10 Mbps downstream/1 Mbps upstream. For that reason, the Commission should give price cap carriers the opportunity to obtain an additional three years of support and time to complete the CAF II build-out.

Elsewhere in the *FNPRM*, the Commission requests comment on whether it should permit all CAF II recipients to provide service to 95 percent, not 100 percent, of the funded

[119] *See* 47 C.F.R. § 54.313(e).

locations, with the provider's CAF Phase II funding adjusted, accordingly.[120] AT&T supports this proposal and recommends that the Commission lower the minimum to 90 percent. Just as the Commission correctly recognized that the "actual cost for a provider to serve census blocks that are above the extremely high-cost threshold may, in fact, be less than is predicted by the cost model,"[121] so, too, is it likely that there are pockets within eligible census blocks where a provider's actual cost to serve is higher, perhaps significantly so, than predicted by the cost model. If a provider has the flexibility to deploy service to something less than 100 percent of the eligible locations in a state, it will be able to manage its costs more effectively, thereby enhancing the prospects that it would be willing to seek CAF II support. Requiring that service be offered to something less than 100 percent of the funded locations is consistent with the Commission's decision in MFI to require recipients to provide service to "at least 75 percent of the road miles" where they receive support.[122] In that context, the Commission also indicated that if the MFI recipient's coverage is less than 100 percent, "the recipient will receive support only for those road miles actually covered."[123] Allowing similar flexibility in CAF II acknowledges the reality of network deployment where the on-the-ground situation can be considerably different than imagined during the planning stages.

If the Commission permits CAF II recipients to provide service to less than 100 percent of the eligible locations, which it should, the Commission asks whether it should require a CAF

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[120] *FNPRM* at ¶ 165.

[121] *Id.* at ¶ 31.

[122] *USF/ICC Transformation Order* at ¶ 365. *See also id.* at ¶ 366 (noting that commenters explained that, due to the "high expense of providing last mile coverage in difficult circumstances, requiring 100 percent coverage may dissuade parties from seeking support and expanding coverage").

[123] *Id.* at ¶ 367.

II recipient to specify the percentage of locations to which it will provide broadband service at the time the Commission first authorizes its funding or whether the recipient should be permitted to adjust that number during its CAF II service term.[124] AT&T recommends that the Commission require the CAF II recipient to specify upfront what percentage it will build to and the Commission should fund it on that basis (rather than assuming that the recipient will build to 100 percent of the locations and paying the CAF II recipient 100 percent of the funding). This approach ensures that funds are not sidelined by committing them to a provider that is unlikely to use them. Instead, the up-to-10 percent that a CAF II recipient opts to forgo could be put to better use by another provider to provide service in additional unserved areas.

The Commission also requests comment on the methodology it should use in the event a CAF II recipient opts to provide broadband service to less than 100 percent of the eligible locations. The Commission proposes two methodologies: "modelled-support method" and "direct-proportion method."[125] AT&T recommends that the Commission use the direct-proportion method for all CAF II recipients, which means that for every one percent of locations a recipient does not serve, its support would decrease by one percent. This methodology is the only one that could be implemented at the time of CAF II acceptance. The modelled-support method could not be implemented at the time of acceptance because CAF II recipients simply will not be able to identify which locations will fall into the up-to-10 percent category until well into the network build process. Moreover, the modelled-support methodology seems as though it will be difficult (if not impossible) for USAC to administer.

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[124] *FNPRM* at ¶ 165.

[125] *Id.* at ¶ 166 & n.350.

If a carrier provides service to something less than what it committed (e.g., 92 percent instead of the promised 95 percent), USAC should recover support using the direct proportional methodology, which would be tied to the number of locations to which the recipient failed to provide broadband by the end of the service term. USAC's recovery should go back to the carrier's first CAF II payment. In the event the carrier deploys broadband service to a larger number of locations than what it initially committed (e.g., it initially commits to 92 percent but ends up providing broadband to 97 percent of the locations), the Commission could either true up the carrier's support at the end of the service term (by giving it more support, as it will do with the MFI recipients)[126] or take no further action. AT&T's view is that additional funding is unnecessary in this circumstance as the CAF II recipient plainly did not require extra support to complete those additional builds.

If the CAF II recipient's final build is less than 90 percent of the eligible locations, which is the minimum AT&T recommends the Commission establish, the Commission could consider the recipient to be in default of its performance obligations and it could assess a penalty of, perhaps, 5 percent of the total amount awarded, in addition to the recovery we discuss above (e.g., provider initially commits to 92 percent but ultimately builds to 82 percent of the locations). AT&T opposes the Commission recovering *all* of the support that the CAF II recipient received or imposing a penalty in excess of 5 percent of the recipient's total funding if it fails to satisfy all of its performance obligations. Doing so is unnecessarily punitive and fails to account for the fact that the CAF II recipient may have experienced delays outside of its control (e.g., permitting delays, delays caused by labor or materials shortages). AT&T and other prospective CAF II participants would be unlikely to participate at all in CAF II if they could

[126] *USF/ICC Transformation Order* at ¶ 367.

lose all of their support in the event they failed to meet a particular performance standard even though they were in substantial compliance with all of other performance obligations. The purpose of CAF II is to offer broadband to Commission-identified eligible areas, not to penalize recipients that are making good faith efforts to meet the requirements. For that reason, it is essential that the Commission consider the goals of the program and the reality of major network construction projects when it determines the consequences to a CAF II recipient if the provider misses a performance requirement. And, of course, the Commission should communicate those consequences clearly before it offers CAF II funding to any provider.

C. The Commission Should Modify Its Definition Of "Unsubsidized Competitor" To Account For Any Service Provider That Satisfies The CAF II Service Obligations Regardless Of Technology.

The Commission proposes to exclude from the offer of model-based CAF II support any census block that is served by a facilities-based terrestrial competitor offering fixed residential voice and broadband services that meets the Commission's service requirements.[127] AT&T recommends that the Commission modify its proposed requirement to exclude any census block that is served by a facilities-based provider offering residential voice and broadband services that meet the Commission's CAF II service requirements, finding that funding overbuilders is a wasteful use of the Commission's tight CAF II budget.[128] Thus, it should decline to discriminate against providers using a particular technology (e.g., mobile wireless or satellite providers) by treating these areas as CAF II-eligible as long as these alternative technology providers offer voice and broadband services that satisfy the CAF II requirements. Similarly, the Commission

[127] *FNPRM* at ¶ 174.

[128] *Id.* at ¶ 175 (expressing skepticism that funding overbuilders is an efficient use of CAF II dollars).

should of course exclude such areas (including areas served by price cap carriers that meet the CAF II requirements) from the CAF II competitive bidding process.[129]

D. The Commission Should Adopt Its Proposal To Sunset CAF II ETC Designations Upon Expiration Of The Service Term And The Commission Should Adopt Its CAF II ETC-Related Designations Deadlines.

As is evident from the discussion above in Section II, AT&T supports the Commission's proposal to sunset an ETC designation tied to CAF II participation after the funding term has expired and the CAF II recipient has fulfilled its build-out and service obligations.[130] Our prior discussion also should make clear how unnecessary it is, as the Commission suggests, to convert automatically a CAF II ETC designation to Lifeline-only ETC designations at the conclusion of the CAF II ETC's service term. The data are quite clear that there most certainly are other providers offering Lifeline benefits in such areas. This does not preclude a former CAF II ETC from voluntarily electing to continue operating as a Lifeline-only ETC. Rather, it is AT&T's belief that, in virtually all cases, such an automatic conversion is unnecessary to ensure that eligible low-income consumers continue to have access to Lifeline-discounted service and the Commission should assume that retaining a Lifeline-only ETC designation is both unnecessary and not desired by the former CAF II ETC. What happens to their ETC designations at the close of their service term is another ground rule that all prospective CAF II participants must

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[129] *Id.* The Commission seeks comment on whether it should exclude served areas only if the current provider certifies that it is willing and able to continue providing broadband for a specified period of time, such as five years. *Id.* at ¶ 177. Such a certification may have a superficial appeal but AT&T does not recommend that the Commission adopt this requirement because these provider certifications could never be enforced in the event the provider discontinues service in a particular area before the end of that five-year term.

[130] *Id.* at ¶ 184.

understand before they are asked to participate (either via the state-level commitment or through the competitive bidding process).

Finally, AT&T supports the Commission's proposal to adopt deadlines for when a winning bidder must file its CAF II ETC application and when a state commission must act (or not) on such an ETC application.[131] If a state commission considers a CAF II ETC application, AT&T also recommends that the Commission either prohibit states from imposing state-specific obligations on CAF II ETCs or require states to inform CAF II ETC applicants in writing what those state-specific ETC requirements are before it acts on the CAF II ETC application. In the event that a state seeks to apply its own obligations on CAF II participants, the Commission should permit these participants to default without any penalty.

E. The Commission Should Exclude Areas Covered By Rural Broadband Experiment Proposals From CAF II Eligibility Only When The Commission Awards Funding To Those Applicants.

The Commission requests comment on whether it should remove from CAF II eligibility areas covered by formal proposals for Rural Broadband Experiment funding.[132] The clear and obvious answer is no. Based on the 1,000+ expressions of interest, requesting over $11 billion in funding,[133] the Commission will have more formal requests for funding than it has funding but many of those requests, like the expressions of interest, could be far from satisfying even the most basic requirements for support. If the Commission removes from a price cap carrier's state-

[131] *Id.* at ¶¶ 181 (proposing that winning bidders submit a CAF II ETC application within 30 days of the public notice announcing that it is the winning bidder) & 182 (proposing a rebuttable presumption that the state commission lacks jurisdiction if it fails to open a proceeding on the CAF II ETC application within 60 days or if it fails to decide a CAF II ETC application within 90 days).

[132] *Id.* at ¶¶ 220-23.

[133] *Rural Broadband Experiments Order* at ¶ 5.

level commitment areas covered by formal proposals, it is sure to remove areas that will not receive Rural Broadband Experiment support. Another concern that the Commission identifies, which AT&T shares, is that such a proposal could incent would-be competitive bidders to file formal proposals that are less than sincere in order to remove census blocks that are desirable to the competitor from the state-level commitment. This action would make those census blocks unavailable during the state-level commitment but available for CAF II funding through the competitive bidding process. Also, other entities may file proposals simply to keep a CAF II-funded competitor out of their areas even though they do not intend to participate in the competitive bidding process.

The Commission should endeavor to award Rural Broadband Experiment funding before it offers price cap carriers the state-level commitment. Those areas covered by winning Rural Broadband Experiment bids should be removed from CAF II eligibility altogether (i.e., from the state-level commitment as well as the competitive bidding process if the price cap carrier declines the offer).[134] If the Commission is unable to issue Rural Broadband Experiment awards prior to the state-level commitment election or the competitive bidding process, then the Commission should decline to fund Rural Broadband Experiment proposals that are in census blocks covered by either a price cap carrier's state-level commitment or a winning CAF II competitive bid. No matter how the timing works out, the CAF II program should be given the priority in funding decisions because it is not an "experiment" but the Commission's statutorily required high-cost program.

[134] *Id.* at ¶ 18 (concluding that it will remove census blocks covered by winning Rural Broadband Experiment bids from CAF II eligibility).

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